

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JARED L. COPE and JONEA C. COPE,
husband and wife,

Plaintiffs,

v.

WINCO FOODS, LLC,,

Defendant.

No. CV-07-5064-FVS

ORDER GRANTING SUMMARY
JUDGMENT

THIS MATTER came before the Court on June 29, 2010, based upon the defendant's motion for summary judgment. The defendant was represented by Francis L. Van Dusen, Jr. The plaintiffs were represented by Janet E. Taylor.

BACKGROUND

Jared Cope worked for WinCo Foods, LLC, in Richland, Washington. WinCo's Richland store is divided into eight departments. Each department has a manager. Mr. Cope was the manager of the meat department. The eight department managers at the Richland store joined together to form the Department Managers Hourly Employee Association ("Association"). The newly-formed Association needed a chairperson. One of its members -- Mike James, the manager of the bulk foods department -- volunteered to serve. None of the other seven members wanted the job, so Mr. James became the Association's chairperson. He served in that capacity for approximately eight

1 years. By the end of that time, he had grown tired of the job.
2 Consequently, he asked another manager to take over. The other person
3 agreed to do so. There is no indication the other managers voted to
4 approve the new chairperson. The change simply happened. The absence
5 of formality is characteristic of the Association. Throughout its
6 existence, it has been an informal organization. Its members do not
7 hold regular meetings, nor do they elect officers.

8 Over the years, the Association has negotiated a series of
9 collective bargaining agreements with WinCo. Each collective
10 bargaining agreement ("CBA") has a grievance procedure. Pursuant to
11 its terms, a department manager may present an employment-related
12 dispute to a committee that is composed of some of the members of the
13 Association. The parties refer to the grievance committee as the
14 "Department Head Committee" or the "DHC." After a hearing, the DHC
15 issues a ruling regarding the manager's grievance. Either the manager
16 or WinCo may request arbitration of an adverse ruling.

17 WinCo fired Mr. Cope during the Summer of 2007. He filed a
18 grievance. The Department Head Committee held a hearing. After
19 considering the information submitted to it, the DHC ruled in his
20 favor. On July 31, 2007, the DHC ordered WinCo to reinstate him to
21 his former position. WinCo did not request arbitration. Mr. Cope
22 alleges WinCo refused to comply with the DHC's ruling. WinCo denies
23 his allegation.

24 As it turned out, Mr. Cope did not ask the Association to help
25 him enforce the ruling issued by the DHC on July 31st. Instead, he
26 retained an attorney on his own. On October 22, 2007, he and his wife

1 filed a complaint against WinCo in United States District Court. The
2 first cause of action alleged WinCo breached the CBA by failing to
3 reinstate Mr. Cope. The second cause of action alleged WinCo
4 retaliated against Mr. Cope for invoking the grievance process by
5 discharging him. The third cause of action alleged WinCo deprived
6 Mrs. Cope of her husband's consortium.

7 WinCo moved to dismiss the breach-of-contract claim on the ground
8 it was subject to binding arbitration. The Court ruled an arbitrator
9 had to determine whether WinCo was correct in that regard. During
10 December of 2008, an arbitrator issued an order. He concluded, "[T]he
11 parties have exhausted their procedural rights to resolve Mr. Cope's
12 breach of contract claim through arbitration under the terms of the
13 [CBA.]" (Order of December 4, 2008, at 5.) The arbitrator's ruling
14 was narrow. He declined to address whether WinCo had complied with
15 the decision of the Department Head Committee or whether Mr. Cope was
16 obligated to file a grievance challenging WinCo's alleged failure to
17 comply. *Id.*

18 On September 29, 2009, the Copes filed an amended complaint that
19 pleads a single cause of action. Jurisdiction is predicated upon
20 Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C.
21 § 185. The Copes' single cause of action has two components. They
22 allege WinCo violated the CBA by failing to reinstate Mr. Cope to his
23 former position in accordance with the Department Head Committee's
24 ruling, and they allege the Association breached its duty of fair
25 representation by failing to seek judicial enforcement of the DHC's
26 ruling when WinCo failed to comply. WinCo moves for summary judgment.

1 Fed.R.Civ.P. 56. According to WinCo, there are three reasons why
2 summary judgment is warranted: First, WinCo argues the Copes cannot
3 prove one of the elements of their claim. Second, WinCo argues their
4 claim is barred by the statute of limitations, and, third, WinCo
5 argues they waived their claim by failing to submit it to an
6 arbitrator.

7 STANDARD

8 Rule 56(c) provides, "[J]udgment . . . should be rendered if the
9 pleadings, the discovery and disclosure materials on file, and any
10 affidavits show that there is no genuine issue as to any material fact
11 and that the movant is entitled to a judgment as a matter of law."

12 RULING

13 A. Elements Of Claim

14 "[I]t is the policy of the National Labor Relations Act to allow
15 a single labor organization to represent collectively the interests of
16 all employees within a unit, thereby depriving individuals in the unit
17 of the ability to bargain individually[.]" *DelCostello v. Teamsters*,
18 462 U.S. 151, 165 n.14, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983).
19 Depending upon the terms of the collective bargaining agreement
20 between the union and the employer, the union may have discretion to
21 supervise the grievance machinery established by the CBA. *Vaca v.*
22 *Sipes*, 386 U.S. 171, 191, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). While
23 "a union may not arbitrarily ignore a meritorious grievance or process
24 it in perfunctory fashion," *id.*, 87 S.Ct. 903, a union may settle a
25 member's grievance against the employer. *Id.* at 192, 87 S.Ct. 903.
26 Indeed, the union may settle a member's grievance on terms to which he

1 objects. See *id.* at 192-95. Given the union's authority and the
2 member's vulnerability, the union must "serve the interests of all
3 members without hostility or discrimination toward any, to exercise
4 its discretion with complete good faith and honesty, and to avoid
5 arbitrary conduct.'" *DelCostello*, 462 U.S. at 165 n.14, 103 S.Ct.
6 2281 (quoting *Vaca*, 386 U.S. at 177, 87 S.Ct. 903). In *DelCostello*,
7 the Supreme Court acknowledged the rule permitting a union to exercise
8 discretion over a member's grievance "works an unacceptable injustice
9 when the union representing the employee in the grievance/arbitration
10 procedure acts in such a discriminatory, dishonest, arbitrary, or
11 perfunctory fashion as to breach its duty of fair representation. In
12 such an instance, an employee may bring suit against both the employer
13 and the union[.]" 462 U.S. at 164, 103 S.Ct. 2281. Courts typically
14 refer to a claim such as this as "'a hybrid § 301/fair representation
15 claim.'" *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 988 (9th
16 Cir.2007) (quoting *Carrion v. Enterprise Ass'n, Metal Trades Branch*
17 *Local Union 638*, 227 F.3d 29, 34 (2d Cir.2000)). A hybrid § 301/fair
18 representation claim has two critical components. *Id.* at 987. The
19 two are "inextricably interdependent." *DelCostello*, 462 U.S. at 164,
20 103 S.Ct. 2281. Not only must the Copes prove WinCo breached the CBA,
21 but also they must prove the Association breached its duty of fair
22 representation. *Id.* at 165, 103 S.Ct. 2281. Although the Copes must
23 prove the Association breached its duty of fair representation, they
24 need not name the Association as a defendant in order to obtain relief
25 under § 301. *Id.* If they desire, they may sue only WinCo, which is
26 what they have chosen to do.

1 B. Statute of Limitations

2 A hybrid § 301/fair representation claim is subject to a six-
3 month statute of limitations. *DelCostello*, 462 U.S. at 169-70, 103
4 S.Ct. 2281; *Soremekun*, 509 F.3d at 989 n.39. The Copes have not filed
5 a claim against the Association. WinCo submits it is now too late for
6 them to do so; a point the Copes do not contest. Believing, as WinCo
7 does, that it is now too late for Mr. Cope to bring a claim against
8 the Association, WinCo argues it is also too late from them to bring a
9 claim against the company. WinCo is mistaken. The Second Circuit
10 explained why in *White v. White Rose Food*, 128 F.3d 110, 116 (2d
11 Cir.1997):

12 The fact that the plaintiffs are time-barred from bringing a
13 claim against the union does not mean that "the plaintiffs
14 cannot prove that Local 138 breached its duty of fair
15 representation" in an action against White Rose. . . .
16 [P]laintiffs suing under a § 301/DFR theory need not sue
17 their union at all: it could hardly be that the running of
18 the limitations period as to the union extinguishes the
19 right of action against the employer. The fact that
20 *DelCostello's* limitations period has expired as against
21 Local 138 has no bearing on the validity of the plaintiffs'
22 suit against White Rose.

23 (Internal cross reference omitted.) So, too, here. The Copes' claim
24 against WinCo is not barred by the statute of limitations for the
25 reason asserted by the company. Which is not to say the Copes' claim
26 is timely; only that WinCo's basis for challenging the timeliness of
the claim is unpersuasive.

25 C. WinCo's Request for Summary Judgment On The Merits

26 WinCo does not bear the burden of persuasion at trial. The Copes

1 do. In order to prevail, they must prove both that WinCo breached the
2 CBA and that the Association breached its duty of fair representation.
3 *DelCostello*, 462 U.S. at 165, 103 S.Ct. 2281. A Rule 56 moving party
4 without the burden of persuasion at trial may qualify for summary
5 judgment by showing "the nonmoving party does not have enough evidence
6 of an essential element to carry its ultimate burden of persuasion at
7 trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099,
8 1102 (9th Cir.2000). Winco relies upon this principle; arguing the
9 Copes cannot prove the Association breached its duty of fair
10 representation by failing to seek judicial enforcement of the
11 Department Head Committee's reinstatement ruling.

12 D. Rational Fact-Finder Would Be Unable To Find That The
13 Association Breached A Duty To Mr. Cope

14 A collective bargaining agreement may confer authority upon a
15 union to supervise grievance machinery. In such situations, the union
16 has considerable discretion with respect to how aggressively to
17 prosecute an employee grievance; subject, of course, to the union's
18 duty of fair representation. See *Vaca*, 386 U.S. at 194-5, 87 S.Ct.
19 903. If the union decides to pursue the matter to the end of the
20 grievance process, and if the union prevails, the union's duty of fair
21 representation may extend beyond arbitration. The Eleventh Circuit
22 has held:

23 [W]here a collective bargaining agreement specifies an
24 arbitration procedure in which the union functions as the
25 individual's exclusive representative, the job of asserting
26 the individual's potential right of action to enforce the
arbitration award under section 301 is presumed to have been
delegated to the union as one of its duties as exclusive

1 representative.

2 *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881, 886-87 (11th
3 Cir.1985). Two other circuit courts of appeal have since reached the
4 same conclusion. The Eight Circuit did so in *Livingstone v. Schnuck*
5 *Market, Inc.*, 950 F.2d 579, 582 (8th Cir.1991) (quoting *Samples*). The
6 Second Circuit did so in *Carrion v. Enterprise Ass'n, Metal Trades*
7 *Branch Local Union 638*, 227 F.3d 29, 33-34 (2d Cir.2000).

8 Although the Ninth Circuit has not addressed the issue raised in
9 *Samples*, *Livingstone*, and *Carrion*, there is every reason to think it
10 will follow its sister circuits' lead. In other words, there is every
11 reason to think it will conclude that a union violates its duty of
12 fair representation by failing to seek judicial enforcement of an
13 arbitration award. Even so, Mr. Cope faces an obstacle. In each of
14 the three cases cited above, the union served as its members'
15 exclusive representative in the grievance process. The employee had
16 to depend upon his union to protect his interests. Not so, here.
17 Pursuant to the CBA that was in effect in 2007, Mr. Cope had a
18 contractual right to file a grievance with the chairperson of the
19 Association. (Hourly Department Manager Working Conditions & Wage
20 Agreement, ¶ Q(1) at 8.) Once Mr. Cope filed the grievance, the
21 chairperson was required to arrange a hearing. *Id.*, ¶ Q(2) at 8. The
22 chairperson had no discretion in that regard. Furthermore, had the
23 Department Head Committee ruled against Mr. Cope, he could have
24 demanded arbitration. The Association would have been powerless to
25 stop him. *Id.*, ¶ Q(7) at 9. The fact it was Mr. Cope, not the
26 Association, who controlled the grievance process serves to

1 distinguish his case from the cases cited above. Since the
2 Association was not Mr. Cope's exclusive representative in the
3 grievance process (in essence, he represented himself), the
4 Association was not obligated to seek judicial enforcement of the
5 DHC's reinstatement ruling. Enforcement was Mr. Cope's
6 responsibility, not the Association's. Consequently, the Association
7 did not breach a duty to Mr. Cope by failing to seek judicial
8 enforcement of the ruling issued by the Department Head Committee on
9 July 31, 2007.

10 The absence of breach is fatal to Mr. Cope's hybrid § 301/fair
11 representation claim. As noted earlier, the claim has two elements.
12 The second element is that the union breached its duty of fair
13 representation. Mr. Cope cannot prove this element. Thus, a jury
14 would be unable to find for him on the claim. WinCo is entitled to
15 summary judgment.

16 **IT IS HEREBY ORDERED:**

17 WinCo's motion for summary judgment (**Ct. Rec. 129**) is **granted**.
18 The plaintiffs' hybrid § 301/fair representation claim is dismissed
19 with prejudice.

20 **IT IS SO ORDERED.** The District Court Executive is hereby
21 directed to file this order, enter judgment accordingly, furnish
22 copies to counsel, and close the case.

23 **DATED** this 2nd day of July, 2010.

24
25 s/ Fred Van Sickle
Fred Van Sickle
26 Senior United States District Judge